Lo Jian Hooi (practising as a certified architect under the name of Vincent JH Lo Arkitek) v Urban Home Spring Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-573–10 OF 2015
FAIZAH JAMALUDIN JC
16 APRIL 2018

Contract — Breach — Claim for services rendered — Plaintiff appointed as principal consultant by defendant for defendant's project — Plaintiff filed action against defendant claiming professional fees for services rendered — Whether it was proven all services completed by plaintiff — Whether plaintiff entitled to additional 10% of professional fees based the quantity surveyor's estimated cost of project — Whether plaintiff's calculation correct based on letter of appointment ('LOA') — Whether fee structure in LOA in violation of Architects (Scale of Minimum Fees) Rules 2010 — Whether LOA in breach of law — Whether defendant proved on balance of probabilities necessary elements of fraud, misrepresentation and undue influence on part of plaintiff as alleged

Vide a letter of appointment dated 21 November 2014 ('the LOA'), the plaintiff was appointed by the defendant as the principal consultant for the Jawi Mall Project ('the project'). The plaintiff's services were inclusive of Architectural, Quantity Surveying, Civil/Structural and Mechanical/Electrical. In the LOA, the parties agreed that the 10% of the agreed fees based on an estimated cost of RM75m was RM600,000. The defendant had paid two instalments together with 6% service tax of RM254,400 and it was not disputed that the defendant had not paid the balance of RM360,000 together with the applicable 6% service tax. The plaintiff then brought the present action claiming the professional fees for services rendered in the sum of RM1,876,265.12 together with interest. The plaintiff pleaded that upon completing Phase 1 or schematic design stage, he was entitled to a further professional fee of 10% of the agreed fees but based on the estimated cost of the project as prepared by the quantity surveyor ('the QS'). The QS estimated the cost of the project to be RM125,628,840. The defendant had filed a counterclaim for a declaration that the LOA was void and rescinded; and for the refund of the sum of RM254,400 paid by the defendant to the plaintiff, together with interest. The crux of the defendant's defence and counterclaim was that the plaintiff had misled him and through fraud, misrepresentation and undue influence had induced him into signing the LOA and agreeing to proceed with the project. The defendant further submitted that: (a) the fee structure in the LOA was void because it was in violation of the Architects (Scale of Minimum Fees) Rules 2010 ('the Rules'); and (b) the plaintiff as an architect could only collect fees for work which pertain to his

services as an architect and not that of other qualified professionals.

Held:

(1) The plaintiff had failed to provide any evidence to prove that all the other services of Phase 1 as stipulated in the terms of the LOA had been completed. These other services were quantity surveying, civil/structural engineering and mechanical/electrical engineering services. Even if all the services for Phase 1 had been completed, pursuant the terms of the LOA, for services up to Phase 1, 'the professional fees will be 10% of the agreed fees basing on the estimated cost of the project'. 10% of the agreed fees based on the estimated cost of the project was RM600,000. For these reasons, the plaintiff was not entitled to the additional 10% of professional fees based the QS' estimated cost of the project of RM125,628,840 as claimed (see paras 15–17).

(2) The plaintiff's calculation of the fees for Phase 1 of RM1,876,265.12 based on the revised estimated cost of the project as prepared by the QS was wrong as it was not in accordance with the terms of the LOA. Nothing in the terms of the LOA stated that the estimated cost of the project for purposes of calculating the fees for Phase 1 was a cost estimate as revised by a QS. For these reasons, the court found that the professional fees payable by the defendant to the plaintiff pursuant to the terms of the LOA was RM600,000. Accordingly, the court ordered that the defendant paid the plaintiff the sum of RM360,000 together with GST of 6% of the said sum; interest at the rate of 8% on the judgment sum from 27 October 2015–24 January 2018 and at the rate of 5% thereafter until full settlement; and cost of RM20,000 subject to the payment of the allocator fee (see paras 18–20 & 35).

(3) The defendant had failed to prove on a balance of probabilities the necessary elements of fraud, misrepresentation, undue influence on the part of the plaintiff as alleged (see para 23).

(4) Because the defendant had expressly agreed to the higher fees in the LOA and because the fees were above the minimum scale fees stipulated in the Rules, the court found that the fee structure in the LOA was not in violation of the Rules (see para 30).

(5) The LOA expressly stated that the plaintiff was appointed as principal consultant for the project. The plaintiff was not appointed to provide architectural services only. Rule 14 of the Rules stated that an architectural consultancy practice may be appointed to provide project management consultancy services. Appointing and coordinating with all consultants would entail collecting the fees for services rendered by these consultants. For this reason, the court found that the LOA was not illegal and/or in breach of law. For the above reasons, the defendant's

counterclaim was dismissed with costs of RM10,000 subject to payment of the allocator fee (see paras 32, 34 & 36).

[Bahasa Malaysia summary

Melalui surat pelantikan bertarikh 21 November 2014 ('SP'), plaintif telah dilantik oleh defendan sebagai perunding utama untuk Jawi Mall Project ('projek tersebut'). Perkhidmatan plaintif termasuklah arkitek/juruukur, sivil/struktur dan mekanikal/elektrikal. Dalam SP itu, pihak-pihak bersetuju agar 10% daripada fi yang dipersetujui berdasarkan anggaran kos RM75 juta adalah RM600,000. Defendan telah membayar dua ansuran beserta 6% cukai perkhidmatan berjumlah RM254,000 dan ia tidak dipertikaikan bahawa defendan tidak membayar baki RM360,000 beserta 6% cukai perkhidmatan yang terpakai. Plaintif kemudian telah memulakan tindakan ini dengan mendakwa fi professional untuk perkhidmatan yang dilakukan adalah berjumlah RM1,876,265.12 beserta faedah. Plaintif mempli bahawa selepas siap Fasa 1 atau peringkat Reka Bentuk Skematik, dia berhak kepada fi professional selanjutnya sebanyak 10% daripada fi yang dipersetujui tetapi berdasarkan anggaran kos projek sebagaimana disediakan oleh juruukur ('JU'). JU itu menganggarkan kos projek berjumlah RM125,628,840. Defendan telah memfailkan tuntutan balas untuk satu deklarasi bahawa SP itu adalah tidak sah dan dibatalkan; dan untuk mendapat balik jumlah RM254,400 yang dibayar oleh defendan kepada plaintif, beserta faedah. Intipati pembelaan dan tuntutan balas defendan adalah bahawa plaintif telah mengelirukannya dan melalui fraud, salah nyataan dan pengaruh tidak wajar telah mempengaruhinya untuk menandatangani SP itu dan mempersetujui untuk meneruskan projek itu. Defendan selanjutnya berhujah bahawa: (a) struktur fi dalam SP itu tidak sah kerana ia melanggar Kaedah-Kaedah Arkitek (Skala Fi Minimum) 2010 ('Kaedah tersebut'); dan (b) plaintif sebagai arkitek hanya boleh mengutip fi untuk kerja yang berkaitan perkhaidmatannya sebagai arkitek dan bukan untuk profesional berkelayakan yang lain.

Diputuskan:

(1) Plaintif telah gagal memberikan apa-apa keterangan untuk membuktikan bahawa semua perkhidmatan Fasa 1 yang lain sebagaimana dinyatakan dalam terma-terma SP telah disiapkan. Perkhidmatan lain tersebut adalah kejuruteraan juruukur, sivil/struktural dan perkhidmatan kejuruteraan mekanikal/elektrikal. Jikapun semua perkhidmatan untuk Fasa 1 telah disiapkan, menurut terma-terma SP terserbut, untuk perkhidmatan sehiingga Fasa 1, 'the professional fees will be 10% of the agreed fees basing on the estimated cost of the project'. 10% daripada fakta yang dipersetujui berdasarkan anggaran kos projek itu adalah RM600,000. Oleh sebab itu, plaintif tidak berhak kepada tambahan 10% fi professional berdasarkan anggaran kos JU untuk projek

A itu yang berjumlah RM125,628,840 sebagaimana dituntut (lihat perenggan 15–17).

(2) Pengiraan plaintif untuk fi bagi Fasa 1 berjumlah RM1,876,265.12 berdasarkan anggaran kos yang disemak semula berhubung projek itu sebagaimana disediakan oleh JU adalah salah kerana ia tidak menurut terma-terma SP. Tiada apa-apa dalam terma-terma SP itu yang menaytakan bahawa anggaran kos projek itu bagi tujuan pengiraan fi untuk Fasa 1 adalah anggaran kos sepertimana yang disemak semula oleh JU. Oleh sebab itu, mahkamah mendapati bahawa fi profesional yang kena dibayar oleh defendan kepada plaintif menurut terma-terma SP itu adalah RM600,000. Oleh demikian, mahkamah memerintahkan agar defendan membayar plaintif jumalh RM360,000 beserta GST 6% daripada jumlah tersebut; faedah pada kadar 8% ke atas jumlah penghakiman dari 27 Oktober 2015–24 Januari 2018 dan pada kadar 5% sehingga penyelesaian penuh; dan kos RM20,000 tertakluk kepada bayaran fi alokator (lihat perenggan 18–20 & 35).

(3) Defendan telah gagal untuk membuktikan atas imbangan kebarangkalian elemen-elemen yang perlu berhubung fraud, salah nyataan, pengaruh tidak wajar di pihak plaintif sebagaimana dikatakan (lihat perenggan 23).

(4) Oleh kerana defendan dengan nyata telah bersetuju kepada fi yang lebih tinggi dalam SP itu dan kerana fi itu adalah melebihi skala fi minimum yang dinyatakan dalam Keadah tersebut, mahkamah mendapati struktur fi dalam SP itu tidak melanggar Kaedah tersebut (lihat perenggan 30).

(5) SP jelas menyatakan bahawa plaintif telah dilantik sebagai perunding utama untuk projek itu. Plaintif tidak dilantik untuk memberikan perkhidmatan perundingan arkitektural sahaja. Kaedah 14 Kaedah tersebut menyatakan bahawa amalan perundingan arkitektural boleh dilantik untuk memberikan perkhidmatan perundingan pengurusan projek. Lantikan dan urusan dengan semua perunding memerlukan kutipan fi untuk perkhidmatan yang dilaksanakan oleh perunding-perunding tersebut. Oleh sebab ini, mahkamah mandapati bahawa SP itu tidak menyalahi undang-undang dan/atau melanggar undang-undang. Berdasarkan sebab di atas, tuntutan balas defendan adalah ditolak dengan kos RM10,000 tertakluk kepada bayaran fi alokator (lihat perenggan 32, 34 & 36).]

Notes

For cases on claim for services rendered, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3510–3513.

Legislation referred to

Architects (Scale of Minimum Fees) Rules 2010 rr 3, 14, 20, 23(1)(b)(ii), 25(3), Schedule

Munir Abdullah (Munir & Co) for the plaintiff.
Chang Tau Sian (Henry Soong & Chang) for the defendant.

Faizah Jamaludin JC:

[1] The plaintiff's claim against the defendant is for:

(a) the sum of RM1,876,265.12 being professional fees for services rendered to the defendant in relation to consultancy services rendered for the development of a proposed shopping mall in Jawi, Seberang Perai Selatan, Pulau Pinang ('Jawi Mall Project'); and

(b) interest on the sum of RM1,876,265.12 at the rate of 5%pa from May 2015 until full settlement.

[2] It is agreed that the terms of the agreement between the plaintiff and the defendant in relation to the consultancy services are found in a letter of appointment ('LOA') dated 21 November 2014 issued by the plaintiff and signed by Mr Goh as director of the defendant.

[3] The defendant has counterclaimed against the plaintiff the following:

(a) a declaration that the LOA is void and is rescinded;

(b) the sum of RM254,400 paid to the plaintiff to be refunded to the defendant;

(c) interest on the sum of RM254,400 at the rate of 5%pa from the date determined by this court until date of judgment; and

(d) interest on the judgment debt until full settlement.

[4] The LOA expressly states that the plaintiff is appointed as the principal consultant for the Jawi Mall Project and that his services are inclusive of architectural, quantity surveying, civil/structural and mechanical/electrical and goes on to provide the scope of services to be provided. The LOA does not state that the plaintiff is to provide architectural services only.

[5] The architectural, quantity surveying, civil/structural and mechanical/electrical services are to be provided in four separate phases and each phase is expressly detailed in the LOA. The relevant provisions in the LOA states as follows:

A We thank you for appointing our firm as the Principal Consultant for the above mentioned project

Our professional fees shall be *8% of the Final Total Contract Sum as follow* [sic]:

Our services are inclusive of Architectural, Quantity Surveying, Civil/Structural and Mechanical /Electrical.

B Scope of services to be provided as follows:

Architectural

Phase 1: Schematic Design

C Phase 2: Design Development

Phase 3: Contract Documentation

Phase 4: Contract Implementation and Management

Quantity Surveying

D Phase 1: Pre-contract (Preliminary Estimates)

Phase 2: Specification & Detailed Estimates

Phase 3: Pre-tender Estimates and Tender Report

E Phase 4: Post Contract Stage (Contract Management)

Civil/Structural Engineering

Phase 1: Preliminary Design

Phase 2: Design Development

F Phase 3: Contract Documentation

Phase 4: Contract Implementation and Management

Mechanical / Electrical Engineering

G Phase 1: Schematic Design

Phase 2: Design Development

Phase 3: Contract Documentation

Phase 4: Contract Implementation and Management'

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[6] The LOA expressly states that the plaintiff's 'professional fees is 8.0% of the Final Total Contract Sum'. The term 'Final Total Contract Sum' is not defined in the LOA.

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[7] The terms of payment under the LOA state that:

> Upon completion of the building layout plan and 3D perspective together with section, professional fees will be *10% of the agreed fees basing on the estimated cost of the project.*

[8] The *estimated cost of the project* stated in the LOA is RM75m.

[9] In the LOA, the parties agreed that the 10% of the agreed fees based on an estimated cost of RM75m is RM600,000. The agreed schedule of payment was:

25 January 2015	—	RM120,000
28 February 2015	—	RM120,000
28 March 2015	—	RM120,000
28 April 2015	—	RM120,000
28 May 2015	—	RM120,000

[10] The defendant paid two instalments together with 6% service tax of RM254,400. It is not disputed that the defendant has not paid the balance of RM360,000 together with the applicable 6% service tax.

[11] The plaintiff pleads in para 7 of the statement of claim that upon completing Phase 1 or schematic design stage, he is entitled to a further professional fee of 10% of the agreed fees but based on the estimated cost of the project as prepared by the quantity surveyor ('QS'). The QS estimated the cost of the project to be RM125,628,840.

[12] It is expressly agreed in the LOA that:

For Services up to Phase 1:	Professional Fees will be 10% of the agreed fees basing on the estimated cost of the project.
For Services up to Phase 2:	Professional Fees will be 20% of the agreed fees basing on the estimated cost of the project in accordance with the contractor's progress payment.
For Services up to Phase 3:	Professional Fees will be 20% of the agreed fees basing on the Tendered Price in accordance with the contractor's progress payment.
For Services up to Phase 4:	Professional Fees will be 40% of the agreed fees basing on the total Final Cost of all Works or the Original Contract Sum whichever is greater. The Balance of the 40% of the Total Fees will be paid by equal instalments till the completion of the project.
	The Balance of the Final 5% of the agreed fees will be paid upon obtaining of Certificate of Fitness

SERVICES UP TO PHASE 1

[13] Based on the express terms of the LOA, the services to be rendered in Phase 1 by the plaintiff as principal consultant of the project are not just

A architectural services but also that of the quantity surveying, civil/structural and mechanical/electrical services for Phase 1. The services to be provided for Phase 1 under the LOA are as follows:

Architectural: Phase 1: Schematic Design

B *Quantity Surveying:* Phase 1: Pre-contract (Preliminary Estimates)

Civil/Structural Engineering: Phase 1: Preliminary Design

Mechanical/Electrical Engineering: Phase 1: Schematic Design

C **[14]** The plaintiff pleads that as he had carried out works up to schematic design stage by developing the preliminary conceptual sketch proposals into sketch design to a stage sufficient to enable an application be made for planning approval in principle by the Seberang Jaya Municipal Council, therefore, the fees payable by the defendant is:

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8% x RM125,628,840 x 20% + 6% GST	=	RM2,130,665.12 (RM254,400.00) RM1,876,265.12

E **[15]** However, the plaintiff has failed to provide any evidence to prove that all the other services of Phase 1 as stipulated in the terms of the LOA has been completed. These other services are quantity surveying, civil/structural engineering and mechanical/electrical engineering services as set out in para [13] above.

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[16] Even if all the services for Phase 1 had been completed, pursuant the terms of the LOA, for services up to Phase 1, 'the professional fees will be 10% of the agreed fees basing on the estimated cost of the project'. 10% of the agreed fees based on the estimated cost of the project is RM600,000.

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[17] For these reasons, I find that the plaintiff is not entitled to the additional 10% of professional fees based the QS' estimated cost of the project of RM125,628,840 as claimed.

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[18] I also find that the plaintiff's calculation of the fees for Phase 1 of RM1,876,265.12 based on the revised estimated cost of the project as prepared by the QS to be wrong as it is not in accordance with the terms of the LOA. The LOA expressly states that:

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For Services up to Phase 1:	Professional Fees will be 10% of the agreed fees basing on the estimated cost of the project.

[19] The estimated cost of the project expressly stated in the LOA is RM75m. Nothing in the terms of the LOA states that the estimated cost of the project for purposes of calculating the fees for Phase 1 is a cost estimate as revised by a QS.

[20] For these reasons, I find that the professional fees payable by the defendant to the plaintiff pursuant to the terms of the LOA is RM600,000.

DEFENCE AND COUNTERCLAIM

[21] The crux of the defendant's defence and counterclaim is that the plaintiff had misled him and through fraud, misrepresentation and undue influence had induced him into signing the LOA and agreeing to proceed with the Mall Project. And that the plaintiff had misled the defendant and represented to him that he can secure financing from a party in China. It is also the defendant's case that the plaintiff had used the figure of RM75m and allowed the defendant to pay the Phase 1 fees in five monthly instalments 'as a trap' to lure the defendant to sign the LOA.

[22] The defendant is a businessman. He may not be experienced in property development but he is an experienced businessman. He says that he didn't consult a lawyer before entering into the LOA with the plaintiff. He could have but chose not to appoint a lawyer to provide him independent advice on the terms of the LOA before executing the LOA.

[23] I find that the defendant has failed to prove on a balance of probabilities the necessary elements of fraud, misrepresentation, undue influence on the part of the plaintiff as alleged.

[24] The defendant also pleads that the fee structure in the LOA is void because it is in violation of the Architects (Scale of Minimum Fees) Rules 2010 ('the 2010 Rules').

[25] The proposed Jawi Mall Project falls within Category 2 of the Schedule to the 2010 Rules. The Schedule to the 2010 Rules states as follows:

> SCHEDULE
>
> CLASSIFICATION OF BUILDING TYPES UNDER CATEGORIES OF COMPLEXITY
>
> ...
>
> CATEGORY 2
>
> Building types of average complexity requiring a moderate degree of design and detailing

A ...

Mixed residential/commercial complexes

...

Shopping centres/complexes

B ...

[26] Scale of Minimum Fees as provided Category 2 work is as follows:

(a) the fees for basic services as provided in r 23(1)(b)(ii):

C (ii) for building types of average complexity requiring a moderate degree of design and detailing as classified under Category 2 of the Schedule —

Total cost of works	Minimum percentage fee
RM64,000,001 to RM80,000,000	[(Cost – RM64,000,000) x 4.00%] +RM3,037,500

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(b) fees for additional services as provided in r 25(3) is as follows:

(3) The minimum fees for providing the project management consultancy services as specified in r 20 shall be 3.5% of the total cost of works.

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[27] Therefore, based on the 2010 Rules, the minimum percentage fee payable is (Cost – RM64,000,000) x 4.00%) + RM3,037,500 plus 3.5% of total cost of works.

F **[28]** Rule 3 of the 2010 Rules stipulate that any architectural consultancy practice *shall not charge less* than the scale of minimum fees specified in the Rules. It states that higher fees can be charged with the prior agreement of the client. Rule 3 of the 2010 Rules provides:

G 3 Payment of Fees

Any architectural consultancy practice which is engaged by a client to perform any of the architectural consultancy services specified in Part II *shall not charge less than the scale of minimum fees* specified in Part III in addition to the other payments in Part IV, *provided that higher fees*, where justified by the architectural consultancy H practice's special expertise, experience or standing, *may be charged with the prior agreement of the client*.

[29] Pursuant to the terms of the LOA, the defendant agreed to the higher fees of 8% of the final total contract sum.

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[30] Because the defendant had expressly agreed to the higher fees in the LOA and because the fees are above the minimum scale fees stipulated in the 2010 Rules, I find that the fee structure in the LOA is not in violation of the 2010 Rules.

[31] The defendant submitted that the plaintiff as an architect can only collect fees for work which pertain to his services as an architect and not that of other qualified professionals. This issue was not pleaded by the defendant and is only raised in its submissions.

[32] Nevertheless, I shall address it here as it is a point of law as provided by the 2010 Rules and it goes to legality of the LOA as a contract. The LOA expressly states that the plaintiff is appointed as *Principal Consultant* for the Jawi Mall project. The plaintiff was not appointed to provide architectural services only. Rule 14 of the 2010 Rules state that an architectural consultancy practice may be appointed to provide project management consultancy services. Rule 14 states:

> 14 Additional Services
>
> The Additional Services that may be provided by the architectural consultancy practice *under a separate appointment* shall be any or all of the following:
>
> (a) advisory services;
>
> (b) survey and investigation services;
>
> (c) planning and development services;
>
> (d) financial advisory services;
>
> (e) exceptional negotiations and protracted involvement services;
>
> (f) *project management consultancy services;*
>
> (g) miscellaneous services. (Emphasis added.)

[33] Rule 20 of the 2010 Rules states that:

> 20 Project Management Consultancy Services
>
> The project management consultancy services that may be provided by the architectural consultancy practice shall be any or all of the following:
>
> (a) providing total project management consultancy services from the inception to completion of a project, including preparing of project briefs, *appointing and coordinating with all consultants, contractors and suppliers*, preparing various levels of project schedules for the planning, implementation and monitoring of all the activities and elements related to the agreed targets, preparing reports and their submission to the client, and accepting the completed works on behalf of the client;

[34] Appointing and coordinating with all consultants would entail collecting the fees for services rendered by these consultants. For this reason, I find that the LOA is not illegal and/or in breach of law as submitted by the defendant.

A DECISION

[35] Accordingly, this court orders that the defendant pays the plaintiff:

(a) the sum of RM360,000 together with GST of 6% of the said sum;

B (b) interest at the rate of 8% on the judgment sum from 27 October 2015–24 January 2018 and at the rate of 5% thereafter until full settlement; and

(c) cost of RM20,000 subject to the payment of the allocator fee.

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[36] The defendant's counterclaim is dismissed with cost of RM10,000 to be paid by the defendant to the plaintiff subject to the payment of the allocator fee.

D ORDER

[37] So ordered accordingly.

Order accordingly.

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Reported by Dzulqarnain Ab Fatar

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